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No. 10-566

Supreme Court, U.S.
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In The Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit properly affirmed a finding of religious purpose where, following remand from this Court, government officials took no constitutionally significant action to purge the continuing religious taint associated with the Counties' Ten Commandments displays?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state as follows:

The American Civil Liberties Union of Kentucky has no parent corporations, and no publicly held corporation owns ten percent or more of the American Civil Liberties Union of Kentucky.

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STATEMENT OF THE CASE

1. The First (Stand-Alone) Displays.

In 1999, McCreary County's Judge Executive erected a Ten Commandments display in the county courthouse that consisted solely of one version of the Ten Commandments. The Decalogue was not part of any "educational, historical, or retrospective exhibit."[1] McCreary County's legislative body, the Fiscal Court, authorized the display and directed that it "be posted in a very high traffic area of the courthouse."[2]

Similarly, Pulaski County's Judge Executive also erected a stand-alone copy of the Ten Commandments in the Pulaski County courthouse. It, too, was not part of any larger educational or historical exhibit.[3]

The Respondents filed suit on November 18, 1999, challenging both displays as contrary to the First Amendment's Establishment Clause. [Petitioner Appendix (Pet. App.) 3a.] Soon thereafter, both Counties amended their displays "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." [*Id.*]

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[1] *ACLU of Kentucky v. McCreary County*, 96 F.Supp.2d 679, 684 (E.D. Ky. 2000) ("*McCreary I*").

[2] *Id.*

[3] *ACLU of Kentucky v. Pulaski County*, 96 F.Supp.2d 691, 695 (E.D. Ky. 2000) ("*Pulaski I*").

2. The Second Displays.

The Counties' amended displays consisted of a large copy of the Ten Commandments with smaller copies of eight other documents (or portions thereof) to the side of or below the Decalogue. These additional documents included:

> (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore Upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact.

[Pet. App. 3a-4a.] While some of these documents were included in the amended displays in their entirety, Petitioners "excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text."[4]

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[4] *McCreary I*, 96 F.Supp.2d at 684; *Pulaski I*, 96 F.Supp.2d at 696.

These second displays were also accompanied by authorizing resolutions (the 1999 resolutions) "which emphasized the importance of religion in historical documents of the United States and encouraged the County Judge Executive to 'post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded.'" [Pet. App. 4a (quoting Dist. Ct. R.E. 199 Ex. B).]

Upon Respondents' motion, the district court preliminarily enjoined these modified Ten Commandments displays in May, 2000. Finding that the Counties "narrowly tailored [their] selection of foundational documents to incorporate only those with specific references to Christianity and texts that . . . were chosen only for their religious references," the district court deemed the modified displays to have the purpose and effect of endorsing religion.[5]

Then, after filing and dismissing an appeal from the preliminary injunction, obtaining new counsel, and unsuccessfully seeking clarification of the preliminary injunction's scope, the Counties erected their third Ten Commandments displays.

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[5] *McCreary I*, 96 F.Supp.2d at 687-90; *Pulaski I*, 96 F.Supp.2d at 697-701.

3. The Third (Foundations) Displays.

The Counties' third displays, entitled the Foundations of Law and Government Displays (Foundations Displays), contained nine documents along with an explanation page. [*Id.* at 5a.] This display included the lyrics to the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the national motto "In God We Trust," the Preamble to the Constitution of Kentucky, the Ten Commandments, a picture of Lady Justice, and a one-page explanatory document.[6] [Pet. App. 5a.] Prior to erecting their Foundations Displays, the Counties neither repealed their 1999 resolutions, nor enacted new resolutions authorizing the Foundations Displays. [*Id.* at 6a.]

Respondents then sought (and obtained) a supplemental preliminary injunction barring the Counties' Foundations Displays.[7] In 2003, the Sixth Circuit Court of Appeals upheld the district court's preliminary injunction, 354 F.3d 438 (6th Cir. 2003)

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[6] The Foundations Displays, as originally erected by the Counties, also included Biblical references consisting of "Exodus 20:3-17" and "King James Version" on the Ten Commandments document. *ACLU of Kentucky v. McCreary County, Kentucky*, 145 F.Supp.2d 845, 847 (E.D. Ky. 2001) ("*McCreary II*"). The Counties removed these references following settlement negotiations. *Id.* For the purposes of this brief, references to the "third display" or the Foundations Display shall refer to the Counties' Foundations Displays without these Biblical references.

[7] *McCreary II*, 145 F.Supp.2d at 851-52.

("*McCreary III*"), and, in 2005, this Court likewise affirmed. 545 U.S. 844 (2005) ("*McCreary IV*").

After oral argument before this Court (but before issuance of the opinion), the Counties rescinded their 1999 resolutions and passed new resolutions (the 2005 resolutions) authorizing their Foundations Displays. [Pet. App. 8a; *id.* at 58a n.4 (noting that both Counties repealed their 2001 resolutions within days of the oral argument).] However, in affirming the preliminary injunction, this Court "viewed the repeal of the 1999 resolutions as 'acts of obviously minimal significance in the evolution of the evidence.'" [Pet. App. 8a (quoting *McCreary IV*, 545 U.S. at 872 n.19).]

4. Events Following Remand.

Upon remand, the parties conducted discovery and, after the close of all discovery, filed cross motions for summary judgment. During this time, Petitioners took "no action" concerning the displays or their authorizing resolutions. [*Id.* at 59a.] In ruling on the summary judgment motions, the district court found that there were no factual disputes and that Respondents were correct on the law. [*Id.* at 71a ("No triable issues of fact exist . . . "); *id.* ("the defendants' actions were unconstitutional and remain so until they have purged the taint of their impermissible religious purpose").] But rather than grant summary judgment, the district court concluded that neither party was entitled to judgment as a matter of law.

Specifically, the district court found that the Counties' inaction since this Court's decision in 2005 rendered judgment for them inappropriate because there were no constitutionally significant actions that evinced "a change in their predominantly religious purpose." [*Id.* at 9a.] The district court also denied judgment to Respondents on the basis that the Counties' constitutional violation could not be "continuing" as required for a permanent injunction "because it is possible to purge the taint of the impermissible religious purpose." [*Id.* (internal quotations and citation omitted).]

Respondents timely filed a motion requesting that the summary judgment denial be amended, arguing that the possibility that the Counties might at some future time establish a lawful purpose for the presently unlawful Foundations Display is not a bar to issuing a permanent injunction; at most it may be grounds for later moving to modify that injunction based on changed circumstances. The district court agreed and, on reconsideration, granted summary judgment to Respondents enjoining each of the Counties' three Ten Commandments displays on the basis that the Counties could point to no constitutionally significant facts since this Court's decision in 2005 that evinced a valid secular purpose for posting the Ten Commandments displays. Thus, the "objective observer" would conclude that they did so primarily to advance religion. [Pet. App. 51a-52a (applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in finding Counties' displays violated the purpose inquiry).]

While Respondents' motion to alter or amend the summary judgment decision was pending, the Counties filed a purported "renewed" summary judgment motion. [*Id.* at 37a.] The motion – filed more than one year after the dispositive motion deadline – sought to submit "new" evidence, *i.e.*, new resolutions authorizing the Foundations Displays (the 2007 resolutions) enacted eleven (11) days after the district court's initial summary judgment ruling. [*Id.* at 9a-10a.] Rather than consider Petitioners' motion as one for summary judgment, however, the district court construed it as one under Fed. R. Civ. P. 60 seeking relief from a final judgment in light of its decision to amend its earlier ruling by awarding summary judgment to Respondents. [*Id.* at 10a; 51a.]

The Counties timely filed their notice of appeal from the final judgment granting summary judgment to Respondents but before the district court decided their motion seeking relief under Rule 60 (as construed by the court). Thus, the district court later dismissed that motion without prejudice "on the ground that the court had lost jurisdiction over the [Rule 60] motion when [Petitioners] filed their appeal." [Pet. App. 11a.] Petitioners did not file a second or supplemental notice of appeal from that decision. [*Id.*]

On appeal, the Counties did not challenge the permanent injunction to the extent it barred their first and second displays. [*Id.* at 15a.] Rather, the Counties challenged "only the permanent injunction against the Foundations Display." [*Id.*] In rejecting

the Counties' arguments, the Sixth Circuit affirmed the injunction as to all three of the Decalogue displays with Judge Ryan dissenting. The panel held that since this Court's decision in *McCreary IV*, the Counties had presented "no new facts" to establish that their prior, impermissible purpose had changed. [Pet. App. 20a.] Moreover, the panel found that to the extent the Counties relied upon changes in content between the second and third displays, the passage of time, and changes in governmental personnel, these facts did not constitute "genuine changes in constitutionally significant conditions." [*Id.*] Specifically, the panel noted that two of the claimed changes – differences between the second and third displays, and the enactment of the 2005 resolutions – were considered by this Court in *McCreary IV* when the Court affirmed the preliminary injunction barring the third displays. [*Id.*] The Court of Appeals also held that the passage of time, in this case, was insufficient to purge the Counties' religious purpose because there had been "no dormant period" in the Counties' continued attempts "to defend their actions and accomplish what they initially set out to do." [Pet. App. 20a.] As for the Counties' assertion that change in government personnel also purged the prior religious purpose, the panel rejected that argument noting that the new officials had taken no action to refute the Counties' religious purpose, and that *Lemon*'s purpose inquiry precluded "judicial psychoanalysis of a drafter's heart of hearts." [Pet. App. 20a-21a.]

The Court of Appeals further held that the district court properly construed the Counties' "renewed" motion for summary judgment (in which they first sought to introduce their 2007 resolutions) as one seeking relief from a final judgment under Rule 60 because the Counties tendered the motion and its accompanying "new" evidence more than a year after the close of the district court's discovery and dispositive motion deadlines. [*Id.* at 21a, 25a-30a.] Because the Counties failed to appeal from the district court's dismissal of that motion, the panel also concluded that it lacked jurisdiction to consider whether the district court erred in doing so. [*Id.* at 29a; *id.* at 30a-31a (Smith Gibbons, J., concurring).]

Contrary to the Counties' assertions, the panel did not decide the question of whether the 2007 resolutions were adequate to purge the Counties' religious purpose. Rather, one judge stated that the 2007 resolutions were mere litigation positions and therefore insufficient to purge the Counties' religious purpose, one judge appeared to disagree, and one judge declined to reach the question. [*Id.* at 21a-22a (Clay, J., stating that 2007 resolutions insufficient to purge the Counties' religious purpose); *id.* at 31a-32a (Ryan, J., dissenting) (disagreeing with conclusion that the Counties' past actions were improper and that the 2007 resolutions were mere litigation positions); and *id.* at 30a-31a (Smith Gibbons, J., concurring) (declining to reach question of 2007 resolutions' effect because panel lacked jurisdiction to consider

the Counties' Rule 60 motion in which the resolutions were first raised).]

The Sixth Circuit then rejected the Counties' request for rehearing and rehearing en banc [Pet. App. 34a-35a], with only one judge, Judge Ryan, dissenting from the denial. [*Id.* at 35a.]

PERCEIVED MISSTATEMENTS OF LAW AND FACT

Pursuant to this Court's Rule 15.2, Respondents specifically identify the following perceived misstatements of law and fact in the petition for certiorari.

1. The petition asserts that the Court of Appeals misconstrued this Court's decision in *McCreary IV*, and in doing so held that the Foundations Display violated *Lemon*'s "effect" prong. [Petition for Certiorari ("Pet.") 2, 9, 15.] This is incorrect because the panel specifically noted that "[t]he Supreme Court found the content of the Foundations Displays, in conjunction [with] the evolution of evidence, to reveal Defendants' religious *purpose* in posting the displays." [Pet. App. 15a (emphasis added).] While the panel later described this Court's holding as "definitively" establishing that "the display at issue violates the Establishment Clause" [*id.* at 24a], it is evident that the panel confined its analysis to the purpose inquiry and correctly construed *McCreary IV* as requiring

courts to look to the displays' "context" and "history," not just their contents, when evaluating governmental purpose.

2. The petition also alleges that the Court of Appeals acknowledged that its decision created an intra-circuit conflict with other Sixth Circuit panels finding identical displays constitutional. [Pet. 2, 24.] In fact, the panel explicitly noted that "given the lack of the same type of extended sectarian history" in those cases, they were distinguishable from the facts here. [Pet. App. 23a-24a.]

3. The petition incorrectly asserts that the decision below held that the Counties' 2007 resolutions were mere litigating positions [Pet. 9] and therefore insufficient to purge the Counties' religious purpose. [*Id.* at 7.] As noted above, one judge on the panel opined that they were, one disagreed, and the third declined to reach the issue. [Pet. App. 21a-22a; *id.* at 31a-32a; and *id.* at 30a-31a.] Thus, that portion of the panel's decision lacking a majority does not constitute a holding of the court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"); *Texas v. Brown*, 460 U.S. 730, 737 (1983) (stating that reasoning not adopted by a majority of the court is not binding precedent).

4. The petition also misstates the decision below by claiming that the panel "held that this Court definitively determined that the contents and

history of the Foundations Display are impermissible so that the passage of time, change in government leadership and explicit renunciation of prior governmental actions cannot erase the 'taint' from a decade ago." [Pet. 13-14.] On the contrary, the panel expressly noted that *McCreary IV* "made clear that the counties' past actions do not 'forever taint any effort on their part to deal with the subject matter'" of the Ten Commandments. [Pet. App. 20a.]

5. To the extent Petitioners' first Question Presented impliedly includes whether the district court, in deciding summary judgment, erred by refusing to consider whether the 2007 resolutions were sufficient to purge the Counties' religious purpose, the argument is not properly within this Court's certiorari jurisdiction because the issue was raised for the first time in the Counties' "renewed" motion for summary judgment and Petitioners did not appeal from the dismissal of that motion. [Pet. App. 28a-29a.] *See, e.g., Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that "timely filing of a notice of appeal in a civil case is a jurisdictional requirement").

6. To the extent Petitioners' first Question Presented impliedly includes whether the decision below properly affirmed the district court's ruling as to the Counties' first and second Decalogue displays, Petitioners' failure to present those arguments to the Court of Appeals counsels against this Court's granting certiorari on those questions. [Pet. App. 14a-15a];

see also California v. Taylor, 353 U.S. 553, 556 n.2 (1957).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS, WITH OTHER SIXTH CIRCUIT OPINIONS, OR WITH DECISIONS FROM OTHER CIRCUITS.

The Court of Appeals' decision does not conflict with this Court's precedents applying *Lemon*'s purpose inquiry. Nor does it conflict with decisions from other circuits or prior Sixth Circuit decisions upholding identical displays because *Lemon*'s purpose analysis is a fact-intensive inquiry that can, as this Court noted, result in "the same governmental action" being found constitutional "if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary IV*, 545 U.S. at 866 n.14.

Petitioners' arguments to the contrary are premised upon a fundamental misreading of the Court of Appeals' opinion. Specifically, Petitioners contend that "the Sixth Circuit held that this Court definitively determined that the contents and history of the Foundations Display are impermissible so that the passage of time, change in government leadership and explicit renunciation of prior governmental actions cannot erase the 'taint' from a decade ago." [Pet. 13-14.] Of course, the Court of Appeals did not

so hold. Rather, the panel simply held that the evidence established (as it did when this Court affirmed the preliminary injunction in 2005) that the Counties acted with a predominantly religious purpose in erecting their Decalogue displays, and that Petitioners failed to present any new evidence since this Court's decision in 2005 to justify reaching a different result. [Pet. App. 15a-21a.]

A. The Court of Appeals adhered to this Court's precedents and the law of the case in finding the Counties acted with a predominantly religious purpose in erecting their Decalogue displays.

Petitioners' argument that the decision below conflicts with this Court's precedents, including *McCreary IV*, by improperly construing and applying *Lemon*'s purpose inquiry is without merit. [Pet. 14-19.] The dual premises upon which Petitioners rely – that the panel: 1) adopted a "once tainted, always tainted" approach to evaluating the Counties' purpose [*id.* at 16, 19]; and 2) held that the contents of the Foundations Display constitute a per se violation of *Lemon*'s effect prong [*id.* at 15, 18] – are based upon a fundamental misreading of the decision, not upon any inconsistency with this Court's rulings.

First, there is no support for Petitioners' assertion that the panel adopted a "once tainted, always tainted" approach to assessing the Counties' Decalogue displays. On the contrary, the panel explicitly

noted that "[t]he Supreme Court made clear that the counties' past actions do not 'forever taint any effort on their part to deal with the subject matter. . . .'" [Pet. App. 20a (quoting *McCreary IV*, 545 U.S. at 874).] And the panel properly applied *Lemon*'s purpose analysis by construing the evidence under the "objective observer" standard taking into account the "text, legislative history, and implementation of the statute." [*Id.* at 13a-14a.] Because the Counties could point to no "new" evidence indicating a valid secular purpose for their displays, the panel concluded (as did this Court in 2005) that an objective observer would conclude that the Counties erected those displays primarily to advance religion. [*Id.* at 24a.] Thus, the decision below did not, as Petitioners suggest, hold that "past conduct . . . permanently taints any future displays." [Pet. 19.] Rather, it correctly identified and applied this Court's holdings in conducting the fact-sensitive inquiry for assessing governmental purpose in religious display cases. *See McCreary IV*, 545 U.S. at 867 ("under the Establishment Clause, detail is key").

Petitioners, however, point to the panel's conclusion, *i.e.*, that the Counties erected their Foundations Displays for a predominantly religious purpose, as evidence that the panel adopted a "once tainted, forever tainted" approach. [Pet. 14-15.] But disagreement with the result does not equal misapplication of this Court's precedents, nor does it present a

compelling reason justifying certiorari, even if erroneous.[8] Sup. Ct. R. 10; *see also Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) ("[W]e must never forget that this Court is not a forum for the correction of errors."); *Bd. of Education v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting) ("We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review").

Petitioners also assert that the decision below conflicts with this Court's precedents because the panel held that the contents of the Foundations Display constitute a *per se* violation of *Lemon*'s "effect" prong. [*Compare* Pet. 15 (indicating that Sixth Circuit "intimate[d]" that displays' contents *per se* violated *Lemon*'s effect prong) *with id.* at 18 (stating that a "finding" of the decision below is that "the *contents* of the Foundations Display are unconstitutional") (emphasis in original).] But nowhere in the decision below does the Court of Appeals rest its ruling on *Lemon*'s effect prong – an argument neither relied upon by the district court in rendering its final judgment nor advanced by Respondents on appeal. [*See* Pet. App. 13a-25a (engaging in *Lemon*'s purpose analysis to affirm district court judgment); *id.* at

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[8] In any event, the Court of Appeals reached the correct result because an objective observer, one who possesses reasonable memories and is familiar with context and history of the displays, would conclude that the Counties erected their displays for a predominantly religious purpose. [Pet. App. 15a-20a.]

49a-50a (district court enjoining third displays on basis of the Counties' unlawful religious purpose).] Petitioners' suggestion that the decision below conflicts with *McCreary IV* is thus incorrect and not a compelling reason to grant certiorari. *See, e.g., Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005) (noting Supreme Court acts as court of final review, not "first review" in rejecting arguments not addressed below).

Further, the decision below properly adhered to the law of the case doctrine in holding that Petitioners' pre-*McCreary IV* actions (including the repeal of the 1999 resolutions and the adoption of the 2005 resolutions) were insufficient to overcome the evidence indicating the Counties' predominantly religious purpose because this Court had so held. [Pet. App. 18a-19a.] While the lower courts' adherence to the law of the case doctrine does not foreclose this Court's review, such review should only occur where "extraordinary circumstances" exist, such as where the initial decision "was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). Here, because the panel followed this Court's precedents, particularly the recent holding of *McCreary IV*, no extraordinary circumstances are present warranting this Court's review.

B. The decision below is consistent with other Sixth Circuit opinions upholding identical Foundations Displays because those cases lacked the evidence of religious purpose present here.

The Court of Appeals' decision is also consistent with two prior Sixth Circuit opinions – *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624 (6th Cir. 2005) and *ACLU of Kentucky v. Grayson County, Kentucky*, 591 F.3d 837 (6th Cir. 2010) – that upheld identical Foundations Displays. As Petitioners concede, both *Mercer* and *Grayson* acknowledged the "differential history" surrounding those displays from the displays at issue here. [Pet. 26]; *see also Mercer County*, 432 F.3d at 631 (holding that Mercer County's Foundations Display "lack[ed] a similar sectarian pedigree" to those at issue here); *Grayson County*, 591 F.3d at 849 (noting that, like *Mercer*, Grayson County's display was "not attended by a history evidencing a predominantly religious purpose," there being "no earlier displays" nor "any earlier resolutions indicating an avowedly religious purpose"). This differential history is readily apparent upon examination of those cases.

Specifically, *Mercer* lacked *any* evidence of a religious purpose. 432 F.3d at 631. As the *Mercer* panel noted,

> [T]here was only one display, one authorizing measure, and one implementation, all of which demonstrate a secular purpose. The "Foundations" display is the lone exhibit the

> County has posted in its courthouse. There being but one display, the County has needed but one resolution. Mr. Rousey hung the display himself; there is no evidence of a ceremony solemnized by a clergyman. In fact, the only history the objective observer would incorporate into this display is the statement of Judge McGinnis that the purpose of the display is to recognize American legal traditions.

Mercer, 432 F.3d at 631 (holding that Foundations Display, absent any evidence indicating a religious purpose, did not violate *Lemon*'s purpose or effect prongs).

The record in *Grayson* did contain more evidence suggesting a religious purpose than in *Mercer*, but significantly less than is present here. In finding Grayon County's display analogous to that in *Mercer*, the Court of Appeals noted several factors influencing its decision: 1) the absence of "a history evidencing a predominantly religious purpose;" 2) the lack of prior Decalogue displays or authorizing resolutions indicating "an avowedly religious purpose;" and 3) little "official involvement" in the posting of the display. *Grayson*, 591 F.3d at 849.

Here, of course, the displays' sectarian heritage is vastly different, both in terms of quantity and quality, from those in *Mercer* and *Grayson*. Thus, differences in outcome are not, as Petitioners suggest, indicative of an intra-circuit conflict, bu rather emblematic of factual differences relevant to *Lemon*'s purpose

inquiry. *See McCreary IV*, 545 U.S. at 866 n.14 ("where one display has a history of manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another").

These factual differences (and the compatibility of the cases' holdings) may also explain why no judge on the Sixth Circuit requested a vote on the request for rehearing en banc, and only Judge Ryan expressed a willingness to grant rehearing. [Pet. App. 34a-35a.] Despite Petitioners' claim that the decision below creates an intra-circuit conflict, the Sixth Circuit disagrees, or at least does not perceive it as being one worthy of en banc rehearing. *See Wisniewski v. United States*, 353 U.S. 901 (1957) (in rejecting certification request from Court of Appeals where different panel in same circuit previously resolved the question, the Court noted that "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties").

C. The decision below is consistent with Establishment Clause decisions in other circuits because divergent outcomes are due to relevant factual differences, not conflicting legal standards.

Petitioners also misconstrue the divergent outcomes in other circuit courts' decisions as indicative of

a conflict of authority with the decision below. [Pet. 29-32.] This argument, as with the claimed intra-circuit conflict, is premised on a faulty reading of the panel's decision and a disregard for the role factual differences play in Establishment Clause analysis. *See, e.g., Books v. County of Elkhart*, 401 F.3d 857 (7th Cir. 2005) (pre-*McCreary IV* decision upholding Foundations Display where no prior Decalogue displays or assertions of purpose belied the county's proffered secular rationale); *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc) (post-*Van Orden* decision upholding Ten Commandments monument in public park where monument identical to that in *Van Orden* and no evidence of a predominantly religious governmental purpose); and *Card v. City of Everett*, 520 F.3d 1009, 1020 (9th Cir. 2008) (applying *Van Orden* in upholding granite Ten Commandments monument where "nothing apart from the monument's text suggest a religious motive on the City's part."). In contrast to the cases from the Seventh, Eighth, and Ninth Circuits, which each contained only one authorizing resolution for a single display or no factual context showing a predominantly religious purpose, the multiple resolutions and displays here evinced a religious purpose such that "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *McCreary IV*, 545 U.S. at 872.

Thus, far from creating a conflict, the Sixth Circuit's decision reflects the application of settled

law to an entirely different set of facts than the cases Petitioners cite. Mere factual distinctions between cases rarely, if ever, present an issue meriting this Court's review. Sup. Ct. R. 10; *see also Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923) (dismissing certiorari as improvidently granted where case did not involve either "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" or "principles . . . of importance to the public, as distinguished from that of the parties").

II. THIS CASE IS AN INAPPROPRIATE VEHICLE TO REVISIT THE VALIDITY OF THE *LEMON* FRAMEWORK.

Petitioners also argue that certiorari is appropriate to overrule the Establishment Clause framework established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in favor of an alternative approach. [Pet. 32-48.] But this, too, is not a compelling reason to grant certiorari because this Court previously considered that precise question less than six years ago (in this very case) and reaffirmed *Lemon*'s continued validity. *McCreary IV*, 545 U.S. at 863 (rejecting Counties' arguments seeking abandonment of *Lemon*'s purpose inquiry or alternatively, "trivializing the enquiry into it"). The Court's precedents are "to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United v. Fed. Election Commission*, 130 S.Ct. 876, 911-12 (2010). And where, as here, the

precedent involves constitutional interpretation, the doctrine of *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal quotations omitted). The principle of *stare decisis* is further reinforced on these facts by the law of the case doctrine. *See, e.g., Christiansen*, 486 U.S. at 817 (noting that deviation from law of the case doctrine should occur only where "extraordinary circumstances" present).

Moreover, *Lemon*'s purpose analysis remains a valid, workable test by which courts can gleen governmental purpose from readily discoverable facts. Petitioners' assertions to the contrary notwithstanding, the divergent outcomes in religious display cases, even where identical displays are at issue, are reflective of the flexibility of *Lemon*'s purpose inquiry and the fact-sensitive approach it requires, not a symptom of courts' reliance upon conflicting legal principles or inconsistent application. *See, e.g., McCreary IV*, 545 U.S. at 867 ("under the Establishment Clause, detail is key"); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one"). And as this Court correctly observed, identical displays with varying degrees of "sectarian heritage" can yield divergent results under the Establishment Clause yet present no incongruity. *McCreary IV*, 545 U.S. at 866 n.14.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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